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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 97-021

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

Section NR 538.04 (d) [incorrect numbering in proposed rule] relates to performance standards in the groundwater law. This provision should be reviewed carefully to determine consistency with ch. 160, Stats.

2. Form, Style and Placement in Administrative Code

a. Page numbers should be included in the rule. The absence of page numbers hinders the ability to review the rule.

b. The list of rule sections affected does not include the creation of ch. NR 538.

c. There should be a space between material that is stricken and new material inserted by underlining. For example, see s. NR 500.03 (intro.).

d. The paragraph letters from the current rule in s. NR 500.05 (4) are omitted.

e. The use of “(intro.)” throughout the rule should be reviewed and corrected, as necessary. The term “(intro.)” is not needed in SECTION 8, but should be included in SECTIONS 9 to 11 and 17.

f. Titles should only be shown if the title is for the subunit of the rule being amended. For example, the title “GENERAL” is the subsection title for s. NR 500.08 (1). However, SECTION

9 amends the introductory paragraph, which is treated for drafting purposes as a paragraph, not a subsection. Therefore, it is inappropriate to print the subsection title. This occurs at a number of other places in the rule.

g. In SECTION 18, the phrase “to read” should not be included in the treatment clause.

h. In SECTIONS 19 and 20, the section and subsection number should be included at the beginning of the rule text.

i. Section 538.02 (2) could be clarified by commencing with “This chapter does not apply to any of the following:” and creating three separate paragraphs after that. Also, “or” should be used instead of “nor.”

j. Section NR 538.03 (2) contains substantive material that should not be included in the definition of the term “industrial byproduct.” All of the material following the word “department” should be deleted. Whether the material is beneficially used, has been characterized in a certain fashion and has been determined to meet specified criteria are all issues that are treated in the substantive portions of the rule. To include this material in the definition, in effect, predetermines issues that will be settled by the department when these byproducts are recycled. Similarly, in s. NR 538.03 (3) and (5), the phrases “of designated thickness” and “of specified or selected,” respectively, should be deleted.

k. The paragraph letters in s. NR 538.04 should be converted to subsection numbers.

l. In s. NR 538.06 (4), the first paragraph does not grammatically lead into the following subunits of the subsection. Consequently, the introductory material should be renumbered as par. (a) and the remaining paragraphs renumbered accordingly. The entire rule should be reviewed for the proper use of introductory material.

m. In s. NR 538.08 (2), the word “Department” should not be capitalized.

n. Throughout the rule, the department grants itself great flexibility to avoid rule provisions without any accompanying standards. It is possible that the flexible exemptions that the department grants to itself may engulf the remaining provisions of the rule. For example, s. NR 538.08 (7) provides that the department may, upon request, assign a category for material, or conditionally approve a beneficial use not meeting the beneficial uses or standards specified in ch. NR 538, on a case-specific basis. At the very least, the department’s rule should provide that a variance will be afforded if specified environmental goals nevertheless can be achieved. An example of this treatment can be found in s. 289.43 (7) (c), Stats.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The rule creates a number of references to statutes which use the old statute numbering system for environmental statutes. All of these references were changed by 1995 Wisconsin Act 227, and the rule should be redrafted accordingly.

b. Section 538.01 lists ss. 289.05 and 289.06, Stats., as statutory authority for the rule. However, the analysis of the rule cites 1985 Wisconsin Act 46 as authority for the department to

encourage beneficial reuse of high-volume industrial waste. Should s. 289.43 (4), (7) and (8), Stats., which were created by Act 46, also be cited as statutory authority for the rule?

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. It is not clear why the exception is necessary in s. NR 538.02 (1). The term “industrial byproducts” is defined, and the definition requires the material to be nonhazardous and does not include mining waste. If this exception is necessary, it should be created in the substantive provisions of the rule.

b. Should the relationship of the term “industrial byproduct” in s. NR 538.03 (2) be clarified in relation to the term “high-volume waste” in s. 289.01 (17), Stats?

c. The term “top surface” in s. NR 538.03 (4) should be clarified by indicating to what the term refers. For example, does it refer to the top surface of soil?

d. In s. NR 538.05 (2), the phrase “shall limit” should be replaced by the word “limits.”

e. In s. NR 538.06 (1), the phrase “the appropriate category” should be replaced by the phrase “their appropriate categorization.”

f. Section NR 538.06 (3) (a) refers to a list of concentrations and specific categories, but does not indicate where this list is located and what the categories are. Also, how is the “appropriate” method determined?

g. In s. NR 538.06 (3) (b), the phrase “shall be determined not to be” should be replaced by the phrase “are not.”

h. In s. NR 538.06 (4) (a) to (d), it appears that in the second sentence of each paragraph, a reference to the appropriate category should precede the phrase “industrial byproduct.” For example, in sub. (4) (b), the phrase “category 2” should precede the phrase “industrial byproduct,” since the use of 1,000 or more cubic yards of a category 1 industrial byproduct must be recharacterized under par. (a). Finally, in par. (d), it appears that the word “in” following the word “characterization” should be deleted.

i. In s. NR 538.10 (5) (intro.), it is incongruous to assert in one sentence that concurrence by the department is needed and, in the next sentence, that concurrence by the department is not needed. It is preferable to use a phrase, in the second sentence, such as “concurrence is considered to be granted.” The entire rule should be reviewed for this problem.

j. Should “excluded” be replaced by “prohibited” in s. NR 538.10 (5) (a)?

k. Section NR 538.10 (5) (b) provides that industrial byproducts may not be used as paved lot subbase fill in areas used for residential purposes. What standards will be used to determine whether certain areas are used for residential purposes? The use of the phrase “used for residential purposes” throughout the rule should be reviewed.

l. The title of s. NR 538.12, which refers to “exempt uses,” does not appear to be related to that section of the rule, except for the introductory paragraph.

m. Section NR 538.14 (1) (b) requires listing the name, address and telephone number of a designated contact, but does not indicate who is a designated contact. Is this a department employe or an employe of the generator?

n. The introductory paragraph in s. NR 538.16 (1) requires that industrial byproducts must meet certain criteria. However, the remainder of that subsection establishes requirements for storage facilities, not industrial byproducts. Is storage in itself a beneficial use or are the industrial byproducts stored for later application as a beneficial use?

o. Section NR 538.18 (2) (c) could be clarified. Are these the projects that are undertaken by the Department of Transportation or do they include other projects that are somehow “related” to the Department of Transportation?